

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

State of Washington,	)	
	)	No. 55597-9-I
Respondent,	)	
	)	<b>DIVISION ONE</b>
v.	)	
	)	UNPUBLISHED OPINION
Joel Lavel Robinson,	)	
	)	
Appellant.	)	FILED: August 14, 2006
	)	

PER CURIAM — Joel Robinson appeals his conviction of assault in the second degree—domestic violence. He argues that the trial court abused its discretion in allowing the State to call rebuttal witnesses. He also raises several additional grounds for review in a Motion to Dismiss. We affirm.<sup>1</sup>

### **FACTS**

In the early morning hours of July 3, 2003, Kelsey Adams called 9-1-1 to report that she had been assaulted. Adams testified that she had been visiting with a friend, Carolyn Garza, whose brother had recently died. Adams and other friends were taking turns staying with Garza constantly as she grieved. Adams

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<sup>1</sup> Robinson has also filed a “Motion to Modify the Administrator/Clerk’s Ruling of April 21, 2006, Under RAP Rules 17.2(a) and 17.7, Objection to Ruling.” The motion is denied.

was supposed to stay with Garza all night, but Robinson called and wanted her to come over. She left Garza's house some time after 1:00 or 1:30 a.m. and drove to Robinson's Renton condominium. She called Robinson when she arrived in the parking lot so he could unlock the door for her. Telephone records show that the next call from her cell phone was the 9-1-1 call she placed approximately 27 minutes later to report the assault.

Adams testified that upon arriving at Robinson's condominium, she and Robinson went into his bedroom to have sex. While having sex, Adams bit Robinson on his shoulder. Robinson reacted violently and slapped Adams on the side of her head. He yelled at her and stated that he was going to go to the hospital to get a tetanus shot.

Adams began to grab the clothes she had been wearing as well as some others that she kept in the closet. As she tried to leave, Robinson stopped her and told her that she could not take her things. He grabbed her throat and pushed her against a wall. He then punched her on the left side of her face several times. Adams struggled free and ran to her car.

Adams called 9-1-1 as her eye started to swell shut. Afraid for her personal safety, she asked the police to meet her at a different, well-lit location. Several King County Sheriff's deputies met Adams. At that time, they noted that her face and neck were bruised, and that she was upset and in tears. She was transported to Valley Medical Center by ambulance. Adams sustained a blow-out fracture of her left eye socket. She underwent reconstructive surgery and

had a long recovery period.

Robinson represented himself at trial and testified in his own defense. He presented a different version of events. He testified that Adams visited him at his Seattle office at about 10:00 p.m. on July 2, the evening before the incident. He testified that she looked beaten-up and was drunkenly belligerent, and that she bit him when he tried to give her a hug. He told the jury that he pushed Adams off, and that she stormed away but continued calling him throughout the night. Robinson denied ever striking Adams.

Robinson presented a statement that was a recantation purportedly written by Adams. Adams denied writing the statement. In the defense case-in-chief, Robinson presented the testimony of Virginia Rider, a graphologist. A graphologist is someone who examines handwriting to determine personality traits of the writer. Rider testified that she found significant similarities between the statements and known samples of Adams' writing and concluded that Adams did write the statement. On the stand, Rider corrected her earlier written report, in which she had written that there were significant differences between the two samples.

Before the defense rested, the State informed the court that it intended to call three rebuttal witnesses: Adams, Garza, and Tim Nishimura. Nishimura was a forensic document examiner at the Washington State Patrol Crime Laboratory. Robinson objected that the disclosure of Garza and Nishimura as rebuttal witnesses was untimely. The trial court overruled the objection but ruled

that Robinson could first interview the witnesses. Garza testified that she and Adams were together uninterrupted from approximately 8:30 or 9:00 p.m. the night of July 2, until approximately 1:30 a.m. on July 3, when Adams left. Garza testified that they did not go to Robinson's office in Seattle or otherwise meet up with him that night. Nishimura testified that the quality of the photocopied documents Rider examined was too poor to be useful for forensic examination. In Nishimura's opinion, Adams did not sign the statement, and Adams probably did not write the statement. Nishimura also stated that Rider's training and credentials were of dubious value for forensic document examination.

### **DISCUSSION**

Robinson argues that the trial court erred in allowing Nishimura and Garza to testify in rebuttal. Robinson argues that the State knew that he was going to present Rider's testimony as a handwriting expert, and that the State had sufficient time to investigate her testimony and identify Nishimura earlier than the State did so.

Genuine rebuttal evidence is not simply a reiteration of evidence that was or could have been presented in the case in chief, but is offered in reply to new matters presented by the defendant. State v. White, 74 Wn.2d 386, 394-95, 444 P.2d 661 (1968). The State need not disclose genuine rebuttal witnesses in advance of trial. White, 74 Wn.2d at 395. The trial court's decision admitting rebuttal evidence is reviewed for abuse of discretion. White, 74 Wn.2d at 395. A trial court abuses its discretion if its decision is manifestly unreasonable or if it

exercises its discretion on untenable grounds or for untenable reasons. State v. Vermillion, 112 Wn. App. 844, 51 P.3d 188 (2002).

The trial court properly admitted Garza and Nishimura's testimony in rebuttal. It was not until Robinson's testimony that an issue arose as to whether Adams had met him in Seattle the evening of July 2. Garza's testimony was proper rebuttal to this new matter. Likewise, until Robinson presented Rider's testimony in the defense case-in-chief and offered the documents that Nishimura was called to cast doubt upon, Nishimura's testimony was neither relevant nor necessary. Because Garza and Nishimura were genuine rebuttal witnesses, the State was not required to disclose them in advance of trial.

We next address issues Robinson raised in a motion to dismiss that the trial court transferred to this court. In part, Robinson's motion addresses facts he contends cellular phone records prove about the timeline the night of the altercation. It is the jury's function to weigh evidence, determine witness credibility, and decide disputed questions of fact, and the jury's verdict will be affirmed if substantial evidence supports the jury's findings. State v. Snider, 70 Wn.2d 326, 327, 422 P.2d 816 (1967). Here, substantial evidence supports the jury's finding of guilt and this court does not reweigh the evidence.

Robinson asserts that he was never read his rights under Miranda v. Arizona, 384 U.S. 436, 475, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). First, Robinson expressly waived any Miranda objection in a hearing on October 28, 2004. Second, the remedy for a Miranda violation is suppression of statements

made in response to custodial questioning. No custodial statement was admitted at Robinson's trial. Robinson is not entitled to relief on this ground.

Robinson raises claims regarding an allegedly illegal search of his jail cell. Robinson was sentenced on December 3, 2004. The alleged search occurred on April 15, 2005. Even assuming that the alleged search was illegal, the proper remedy for evidence seized in an illegal search is suppression. State v. Gaines, 154 Wn.2d 711, 716-17, 116 P.3d 993 (2005). Because no evidence seized in the post-trial search could have been used at Robinson's trial, that remedy is unavailable here. Any challenge to the conditions of Robinson's confinement is properly brought in a personal restraint petition if it meets the standards set forth in RAP 16.4(c)(6). See, e.g., In re Personal Restraint of Arseneau, 98 Wn. App. 368, 989 P.2d 1197 (1999) (reaching merits of claim regarding conditions or manner of confinement that implicates a constitutional right of significant importance).

Robinson raises several challenges to the timeliness of state actions governed by the criminal rules. He argues that the State violated CrR 3.2.1(f), which prohibits confining an accused for more than 72 hours unless an information or indictment is filed. The information was filed on December 18, 2003, and an arrest warrant was issued the same day. Robinson was booked on December 23, 2003.<sup>2</sup> There was no violation of CrR 3.2.1(f) under these facts.

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<sup>2</sup> Robinson asserts that in a King County Sheriff's follow-up report, Detective Allen claims he arrested Robinson and closed the case on September 10, 2003. The report does not state what Robinson alleges. It notes that a "Cert for Determination of Probable Cause" dated September 10, 2003 is listed as "active." It mentions an arrest, but does not date the arrest. The record shows the arrest was in December 2003. There was no governmental misconduct or lying.

Robinson argues that the State violated CrR 2.2(g), which requires dismissal by the trial court in certain circumstances where no warrant has been issued and the defendant has not appeared in court 90 days after an information has been filed. Because the arrest warrant issued the same day the information was filed, there was no violation. Robinson incorrectly calculates the time period from when the Certification for Determination of Probable Cause was signed, rather than from when the information was filed.

Robinson argues that he was denied a timely probable cause hearing under CrR 3.2.1(a). This rule requires a judicial determination of probable cause no more than 48 hours following arrest. Here, the trial court determined that probable cause existed prior to Robinson's arrest. There was no violation.

Robinson argues that Detective James Allen signed "Norm Maleng's" Certification for Determination of Probable Cause. Detective Allen authored the statement in the Certification, and properly signed it. Norm Maleng is identified as the King County Prosecuting Attorney in the bottom margin of that document, because it was submitted by the prosecuting attorney's office in support of the information. There was no misconduct.

Robinson contends that he is currently in prison under a nonexistent crime. He cites to State v. Knapstad, 41 Wn. App. 781, 706 P.2d 238 (1985) (dismissing charges where evidence was insufficient to convict defendant of crime charged), and In re Personal Restraint of Andress, 147 Wn.2d 602, 603, 56 P.3d 981 (2002) (vacating conviction for second-degree felony murder

predicated on assault), superseded by statute, RCW 9A.32.050 (2005), as recognized in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). Neither of these cases is relevant and Robinson's claim is without further clarification or support.

Robinson asserts that he has obtained new evidence from Nextel that shows that when Adams called 9-1-1, she was in downtown Seattle, not in Renton. A new trial will not be granted on the ground of newly discovered evidence unless the defendant establishes:

1. The claimed newly discovered evidence must be such that it will probably change the result if a new trial is granted.
2. The evidence must have been discovered since the trial.
3. It must be shown that the evidence could not have been discovered before the trial by the exercise of due diligence.
4. The evidence must be material to the issue and admissible.
5. The newly discovered evidence cannot be merely cumulative or impeaching.

State v. Letellier, 16 Wn. App. 695, 699-700, 558 P.2d 838 (1977); see also CrR 7.5, 7.8(b). Here, Robinson cannot establish elements one, three, or five of the Letellier test. Thus, his claim fails.

Finally, Robinson claims that he was not given three exculpatory documents. He claims he has obtained two of these three documents, a King County Sheriff's Follow-Up Report and the Certification for Determination of Probable Cause. Neither of these documents is exculpatory. Moreover, the Certification was filed with the information and was part of the trial court record. The third document is a "second probable cause" statement written by Detective Allen that is marked "LODI OCT 02 2003 RJC." This statement is a merely copy



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of the Certification for Determination of Probable Cause that has a filing and date stamp on it from the Regional Justice Center. These documents are otherwise

identical. No exculpatory documents were withheld.

We affirm.

FOR THE COURT:

Appelwick, CJ.

Baker, J.

Schindler, ACT